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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of )  
Implementation of Section 621(a)(1) of )  
the Cable Communications Policy Act of 1984 )  
as amended by the Cable Television Consumer )  
Protection and Competition Act of 1992 )

MB Docket No. 05-311

### COMMENTS OF THE CITY OF PIKEVILLE, KENTUCKY

These Comments are filed by the City of Pikeville, KY ("City") in support of the comments filed by the National Association of Telecommunications Officers and Advisors ("NATOA"). Like NATOA, the City of Pikeville, KY believes that local governments can issue an appropriate local franchise for new entrants into the video services field on a timely basis, just as they have for established cable services providers. In support of this belief, we wish to inform the Commission about the facts of video franchising in our community.

#### Cable Franchising in Our Community

##### Community Information

Pikeville is a city in located in the mountains of southeastern Kentucky. It has a population of 6,500. Our franchised cable providers are InterMountain Cable, Southeast Telephone Company and Cequel III.

##### Our Current Franchise

Our current franchise began on November 9, 1987 and expires on November 8, 2007. Under the statutory timeline laid out in the Federal Cable Act, each cable operator has a 6-month window beginning 36 months before the expiration of the franchise in which to request a renewal under the Federal Act. As a result, at this time we are currently negotiating a franchise renewal with the incumbent providers.

Our franchise requires each cable operator to pay a franchise fee to the City in the amount of 5 % of the cable operator's revenues. The revenues for franchise fee purposes are calculated based on the gross revenues of the operator, in accordance with the Federal Cable Act. However, pursuant to HB 272, as of January 1, 2006, the local cable franchising authorities in Kentucky no longer receive cable franchise fees. Instead, the Commonwealth of Kentucky imposes a 3%

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excise tax on multichannel video programming service. The tax is billed to subscribers and collected by providers. Additionally, the Commonwealth of Kentucky imposes a tax of 2.4% on gross revenues from multichannel video programming services and a tax of 1.3% on gross revenues from communication services. According to HB 272, local cable franchising authorities will be "held harmless" by the state for the amount of cable franchise fee revenue they have historically collected.

Our franchise contains the following customer service obligations, by which we are able to help ensure that each cable operator is treating our residents in accordance with federal standards and the terms it agreed to in its franchise. Section 12 (a) requires each cable operator to maintain a conveniently located business office and service center which subscribers may call toll-free. Section 12 (b) requires the cable operators to dispatch personnel to investigate all service complaints and equipment malfunctions within 24 hours and strive to resolve such complaints as quickly as possible. Planned interruptions may only be for "good cause". Said planned interruptions shall be preceded by notice, be of brief duration and occur during minimum viewing hours. Section 12(c) requires each cable operator to maintain a complete list of all complaints and the measures taken to resolve them.

Section 8 of our franchise contains a reasonable build schedule for the cable operators. Section 8(a) states that within six (6) months after the grant of a franchise the cable operator shall construct its system to all areas within its franchise area that pass at least twenty homes per mile; "provided, however, that such time may be extended by the occurrence of delays beyond the control of the Grantee." Section 8(b) provides that if the City annexes any territory, then the cable operators shall have six (6) months to build to any homes that are at least 20 homes per mile from the existing cable plant.

Section 14 of our franchise contains insurance requirements. Specifically, Section 14(a) requires general liability insurance, with liability limits of \$300,000 for personal injury or death of any one person, and \$1,00,000 for personal injury or death of two or more persons in any one occurrence, and \$100,000 for damages to property resulting from any one occurrence. In addition, Section 14(b) requires sufficient workmen's compensation insurance as required by law.

Section 5 of our franchise agreement provides for the following enforcement mechanisms by which we are able to ensure that each cable operator is abiding by its agreement. Specifically, Section 5(b) states that in the event the City finds after notice and hearing that a cable operator has failed to comply with a material provision of the franchise and that the cable operator has failed to correct any failure for ninety (90) days after receipt by the cable operator of written notice of such failure, the City may declare that the cable operator breached its franchise. Within 120 days of receipt of such declaration, the cable operator may commence an action in court. If (i) the court finds after notice and hearing that the cable operator has failed to comply with said material provision and that the cable operator has failed to correct any such failure for ninety (90) days after receipt of written notice, or (ii) the Grantee fails to file suit within the 120 day period, such franchise shall be terminate.

## **The Franchising Process**

Under the law, a cable franchise functions as a contract between the local government (operating as the local franchising authority) and the cable operators. Like other contracts, its terms are negotiated. Under the Federal Cable Act it is the statutory obligation of the local government to determine the community's cable-related needs and interests and to ensure that these are addressed in the franchising process – to the extent that is economically feasible. However derived (whether requested by the local government or offered by the cable operator), once the franchise is approved by both parties the provisions in the franchise agreement function as contractual obligations upon both parties.

Section 16 of our current franchise provides that changes in law which affect the rights or responsibilities of either party under this franchise agreement will be treated as follows: Section 16 states that to the extent any provisions set forth in the franchise is inconsistent with the Cable Communications Policy Act of 1984 or the rules and regulations of the FCC, the provisions of the Cable Communications Policy Act and the rules and regulations of the FCC shall control.

Please noted, that in addition to federal law, Section 163 of the Kentucky Constitution, requires that cable operators must obtain franchises to use city or county streets for any purpose. It is significant to note that the debates of the Constitutional Convention indicate that the purpose of Section 163 "was to prevent the Legislature from authorizing the indiscriminate use of the streets of the city by public utilities without the city being able to control the decision as to what streets and what public ways were to be occupied by such utilities." Mt. Vernon Tel. Co., Inc. v City of Mt. Vernon, 230 S.W.2d 451, 453 (Ky. Ct. App. 1950). In Ray v. City of Owensboro, 415 S.W. 2d 77, 79 (Ky. Ct. App. 1967), the court also stated that the "purpose of the section was to give the city control of the streets, alleys and public grounds and to make it possible for the city to provide the services of these utilities to its inhabitants."

In City of Owensboro v. Top Vision Cable Co. of Ky., 487 S.W.2d 283, 286-87 (Ky. Ct. App. 1972), where Top Vision Cable claimed that Owensboro lacked the authority to require that local CATV operations obtain franchises, the Court reiterated the interpretation of Section 163 that was set forth in Ray. The court also rejected Top Vision's argument that the city could not issue franchises because the "cables and wires will be placed on poles and strung over public ways where existing utility companies have the right to operate by other franchises." City of Owensboro, 487 S.W. 2d at 287. The court stated, "under its general obligation to provide its citizens with safe, clean and unobstructed public ways, the presence of television cables, even in connection with existing utilities, would be an added burden on the city." Id. Thus, the court concluded that the city had the right to require a franchise because the presence of television cables would be an additional responsibility.

## **Competitive Cable Systems**

Our community has never been approached by a competitive provider to provide cable service. However we do have mechanisms in place to offer the same or a comparable franchise to a competitor upon request.

**WestCare Kentucky has agreed to the following provisions in owning and operating the Homeless Shelter in the City of Pikeville:**

The Homeless Shelter would be operated by a non-for-profit organization that has in excess of 32 years of experience operating and managing this type of facility. Providing the expertise and professionalism needed to operate successfully this type of program

The Homeless Shelter would be a "Drug Free Zone"---upon entering the facility, individuals would be required to sign a consent form permitting random drug screens to be done anytime throughout their stay

Background checks will be conducted on each individual seeking shelter services

WestCare would give priority for services to citizens from the City of Pikeville and then citizens of the Big Sandy Area Development District

The city would see an increase in worker production because city workers would no longer be required to maintain the building

We understand that many individuals entering a homeless shelter in Kentucky are dealing with a substance abuse issue, treatment would be provided to those individuals seeking shelter services

WestCare would continue to require residents in the shelter to complete weekly community service

WestCare would place a Community Involvement Center on the first floor of the shelter building. The CIC would provide outpatient and group substance abuse counseling. We would also provide space to groups and individuals such as AA, NA, Lifeline and Hebron that are vital resources to the community

The Shelter would also provide transitional living/re-entry services to the residents coming from our treatment facility at Ashcamp. We will utilize between 4-6 beds at any given time

WestCare, by having ownership of the building, would be eligible to seek Federal, State and local grants as well as funding through private organizations, foundations and the faith community, to operate a successful shelter as well as enhance its array of behavioral health services

WestCare would provide a quarterly report to the City Council on shelter activities

West Care would carry general liability insurance on the facility in the amount that would satisfy both parties

WestCare would provide workers' compensation insurance on each shelter employee

WestCare would maintain the integrity of the building and would seek approval from the city before any permanent structural changes would be made

WestCare would not sublease the facility to another entity

**The City of Pikeville based upon the above agreed upon conditions agree to the following:**

Deeding ownership of the facility to WestCare Kentucky. In the unlikely event WestCare no longer is able to provide services; the property would be deeded back to the City or a compatible non-profit organization of the cities choosing

Provision of funding for two full years starting at the commencement of the City's fiscal year; E.g. (July 1, 2006 through to June 30<sup>th</sup> 2008) after this time period the both entities will work together to determine a reasonable yearly contribution from the city in its support of the shelter.

## **Conclusions**

The local cable franchising process functions well in the City of Pikeville, KY. As the above information indicates, we are experienced at working with cable providers to both see that the needs of the local community are met and to ensure that the practical business needs of cable providers are taken into account.

Local cable franchising ensures that local cable operators are allowed access to the rights of way in a fair and evenhanded manner, that other users of the rights of way are not unduly inconvenienced, and that uses of the rights of way, including maintenance and upgrade of facilities, are undertaken in a manner which is in accordance with local requirements. Local cable franchising also ensures that our local community's specific needs are met and that local customers are protected.

Local franchises thus provide a means for local government to appropriately oversee the operations of cable service providers in the public interest, and to ensure compliance with applicable laws. There is no need to create a new Federal bureaucracy in Washington to handle matters of specifically local interest.

Finally, local franchises allow each community, including ours, to have a voice in how local cable systems will be implemented and what features will be available to meet local needs. These factors are equally present for new entrants as for existing users.

The City of Pikeville, KY therefore respectfully requests that the Commission do nothing to interfere with local government authority over franchising or to otherwise impair the operation of the local franchising process as set forth under existing Federal law with regard to either existing cable service providers or new entrants.

Respectfully submitted,

City of Pikeville, KY



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